1986

Bruce G. Parry and Mansour, INC. v. Okada Hardware Company, LTD., Hirota Tekko, K.K. : Brief of Respondent

Utah Supreme Court

UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

BRUCE G. PARRY and MANSOUR, INC.,

Appellants,

vs. Case No. 860278

OKADA HARDWARE COMPANY, LTD., a foreign corporation, and HIROTA TEKKO, K.K., a foreign corporation,

Respondents.

BRIEF OF RESPONDENT HIROTA TEKKO, K.K.

Appeal From Order Of The Second Judicial District Court
Of Davis County, Honorable Rodney S. Page, Judge

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PARTIES

1. Plaintiff Bruce Parry

2. Defendant Ernst Home Center Corporation

3. Defendant Pay N' Save

4. Defendant Pacific Marine Schwabacher

5. Defendant and Third-Party Plaintiff Mansour, Inc. d/b/a West Coast Mercantile Co. a/k/a WECO (hereinafter "Mansour")

6. Defendant and Third-Party Defendant Okada Hardware, Ltd. (hereinafter "Okada")

7. Defendant and Third-Party Defendant Hirota Tekko, K.K. (hereinafter "Hirota Tekko" or "Hirota")

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Does Hirota Tekko, a Japanese manufacturer, have sufficient minimum contacts with the State of Utah for the Utah state courts to exercise personal jurisdiction over it, when Hirota Tekko's sole contact with the State of Utah is that its product allegedly caused injury within the State?

2. Did Hirota Tekko waive its defense that the Utah state courts lack personal jurisdiction over it by sending a hand-written letter to third-party plaintiff Mansour's counsel which disclaims any responsibility for plaintiff's alleged injuries?

DETERMINATIVE STATUTORY PROVISIONS

Section 78-27-24(3), Utah Code Ann. (1953 as amended) (set forth in Briefs of Appellants and Respondent Okada).

Rule 12(h) of the Utah Rules of Civil Procedure (set forth in Brief of Appellant).

STATEMENT OF THE CASE

The case is adequately stated in the briefs of appellants and respondent Okada.

SUMMARY OF ARGUMENT

Hirota Tekko had insufficient contacts with the State of Utah for the courts of this state to constitutionally exercise personal jurisdiction over it with regard to the plaintiff's

claim. There was no purposeful direct contact between Hirota Tekko and the State of Utah.

Hirota Tekko did not waive its personal jurisdiction defense by its letter to third-party plaintiff Mansour's counsel disclaiming liability. Under a prior holding of this Court, the letter did not constitute an answer or a general appearance and therefore cannot be construed as a waiver of defenses.

ARGUMENT

THE TRIAL COURT'S DISMISSAL OF HIROTA TEKKO FOR LACK OF PERSONAL JURISDICTION SHOULD BE AFFIRMED.

By its ruling of February 25, 1986, as affirmed by its ruling of April 17, 1986, and as amended by its order of May 5, 1986, the trial court dismissed Okada and Hirota Tekko from the instant action for lack of personal jurisdiction. Hirota Tekko submits that the trial court was correct in its dismissal of Okada and Hirota for lack of personal jurisdiction. The trial court's ruling should be affirmed.

1. Okada Hardware And Hirota Tekko Lack Sufficient Minimum Contacts With The State Of Utah To Subject Them To The Jurisdiction Of Utah Courts.

Mansour and Okada have adequately set forth the general framework within which an in personam jurisdiction inquiry is to be made, as articulated by the United States Supreme Court

in International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958), World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 490 (1980), and their progeny. For the sake of brevity, that framework will not be restated or belabored here.

Because Hirota Tekko is one step further removed from Okada in the distribution system and other occurrences which ultimately placed the chopping maul, which allegedly caused the injury complained of, in the State of Utah, Okada's arguments in support of the trial court's ruling on appeal here are at least as compelling with regard to Hirota Tekko as Okada and are adopted herein by this reference.

Hirota allegedly manufactured the chopping maul but did not export the product to the United States. There is no evidence that either Okada or Hirota sold or advertised any products in the State of Utah. R. 396.

This court recently stated the test for determining whether sufficient minimum contacts exist for the exercise of personal jurisdiction as follows:

> In order to determine whether the exercise of jurisdiction over a nonresident defendant would offend traditional notions of fair play and substantial justice, this Court has recognized that "the central concern of the inquiry into personal jurisdiction is the relationship of the defendant, the forum, and the litigation, to each other." The assessment of that

> relationship involves determining whether the defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." It must also be determined "[w]hether the cause of action arises out of or has a substantial connection with the activity; and . . . [there must be a] balancing of the convenience of the parties and the interests of the State in assuming jurisdiction."

Synergetics v. Marathon Ranching Co., Ltd., 701 P.2d 1106, 1110 (Utah 1985) (footnotes omitted) (emphasis added).

Fidelity and Casualty Co. of New York v. Philadelphia Resins Corp., 766 F.2d 440 (10th Cir. 1985), cert. denied, ___ U.S. ___, 106 S. Ct. 853 (1986), also discussed by Okada in its brief, is helpful in determining whether a nonresident defendant has sufficiently "purposely availed" itself of the privilege of conducting activities within a forum state to be subject to that particular forum's jurisdiction. In that case, Philadelphia Resins Corporation (hereinafter "PRC"), a Pennsylvania corporation, was sued in tort, in the United States District Court for the District of Utah by the insurer of a geophysical exploration company, Compagnie Generale de Geophysigne (hereinafter "CGG"). CGG, which was conducting seismic operations in Utah, contracted with one Randall Rogers, a helicopter pilot from Arkansas, to fly equipment and personnel to and from testing sites in the field.

Prior to leaving for Utah, Rogers contacted PRC and ordered three synthetic fiber cables for use in suspending loads from

helicopters. Rogers contacted PRC after seeing an advertisement for the cables in a trade magazine. Rogers told PRC that the cables were to be used in the Rocky Mountain region, but no particular state was mentioned. PRC shipped the cables to Rogers in Arkansas and Rogers brought them to Utah where they failed, causing damage to CGG. Id. at 441, 442.

In finding the district court lacked in personam jurisdiction over PRC, the Tenth Circuit Court of Appeals found, "[t]here is no evidence that PRC advertises by any method specifically directed at the Utah market, nor is there any evidence that PRC employs any personnel in Utah." Id. at 443. The court then noted:

> The sum total, then, of PRC's contacts in Utah are: (1) a miniscule number of sales of products other than "Phillystran" cable, (2) advertising in a national trade magazine that presumably reaches Utah, and (3) the failure of one of its defective "Phillystran" cables in Utah after the cable was taken there by one of its customers.

Id.

The court concluded:

> Although PRC's employee may have known that the cable was destined for use in the Rocky Mountain region, which includes Utah, it was never specifically foreseeable by PRC that its product was destined for the Utah market. PRC's relationship to the Utah market is simply too attenuated to support in personam jurisdiction under the "stream of commerce" theory . . .

* * *

> In this case, the only contact that PRC has with Utah which is related to the cause of action is the fact that a PRC product happened to fail and cause damage in the State. The World-Wide Volkswagen Court made it clear that a seller of chattels does not, in effect, "appoint the chattel his agent for service of process." PRC's knowledge of the mere possibility that its product might be taken into a region of the country in which Utah is located is not sufficient, in our view, to make a difference in this regard.
>
> * * *
>
> We hold that PRC's contacts with the state of Utah, as shown by the record, are insufficient to support the exercise of in personam jurisdiction over PRC in accordance with the Due Process Clause.

Id. at 446, 447 (citations omitted).

The record in the case at bar indicates Hirota Tekko had only one of the three contacts with the State of Utah identified by the court in Philadelphia Resins, namely the presence of its product within the state. There is no evidence in the record that Hirota Tekko sold or advertised any of its products within the state. R. 396. The evidence indicates that the presence in Utah of the product in question, a maul, is entirely fortuitous. One Linda Thayne purchased the maul in Idaho as a Christmas present for her father, a Utah resident. There is no evidence that Hirota Tekko had anything to do with the maul finding its way into Utah. Thus, the purposeful availment needed for the exercise of personal jurisdiction is lacking.

Appellants state:

> The Japanese argument that the Utah courts do not have jurisdiction over them because this product was sold in Idaho is not logical. If this were true, then all manufacturers who sell products in Utah can only be responsible if the specific product in question is purchased in Utah. In today's marketplace, manufacturers such as Toyota, Datsun, and in this case, Hirota Tekko, serve to profit from the sale of their products in Utah. Therefore, they should subject themselves to the Utah court's jurisdiction no matter where the specific defective product that causes the problem may have been purchased.

Brief of Appellants, pp. 14, 15.

Appellants' argument is specious because while Toyota and Datsun engage in substantial advertising and sales within the State of Utah, there is no evidence Hirota sold or advertised any products or had any other contacts with Utah. The constitutional touchstone - minimum contacts - is the same for Toyota, Datsun, Okada Hardware and Hirota Tekko. Such minimum contacts do not exist with regard to Okada or Hirota Tekko.

As was stated in Hanson v. Denckla:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

357 U.S. at 253.

In Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985), the Supreme Court stated:

> This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contracts, or of the "unilateral activity of another party or a third person." Jurisdiction is proper, however, where the contracts proximately result from actions by the defendant himself that create a "substantial connection" with the forum state.

105 S. Ct. at 2183

In this case Hirota had one contact with the State of Utah; a product manufactured by it allegedly caused injury to a third person in Utah after a somewhat complicated set of transfers, a gift and a bailment. Appellants seem to be urging this court to reject the traditional "minimum contacts" inquiry and simply hold that a person or entity can be haled into a court anywhere in the world where one of their products causes damage, no matter how "random," "fortuitous" or "attenuated" the defendant's contacts are with the forum. The approach suggested by appellants is unfounded in the law and should be rejected here.

2. The Letter Sent To Mansour's Counsel By Masakazu Hirota, President Of Hirota Tekko, Was Not An Answer To The Third-Party Complaint And Therefore Did Not Waive Hirota's Defense Of Lack Of Personal Jurisdiction.

On or about August 26, 1985, Masakazu Hirota, President of Hirota Tekko, sent two letters to Mansour's counsel, one written in Japanese and one written in English. The letter

written in English, which is apparently a translation of the letter written in Japanese, reads as follows:

> Second District Court
> In & For Davis County,
> State of Utah,
> Farmington
> Utah 84025 USA
>
> 1985, 26 of August
>
> We haven't any responsibility about this matter, Civil No. 33206.
>
> Masakazu Hirota
> President of Hirota Tekko, K.K.
> 4805 Kako
> Inamicho, Kakogun
> Hyogo, Japan
>
> (Signature of Mr. Hirota in Japanese)
>
> If there is any difference between the two, Japanese sentence and English sentence, in any case, Japanese sentence is right.

On September 9, 1986, Mansour's attorney sent Mr. Hirota's letters to the trial court clerk for filing. R. 428. Although nowhere on either of Mr. Hirota's letters is it stated that the letters are an answer to the third-party complaint, Mansour has subsequently determined to refer to Mr. Hirota's letters as an "answer" or "pro se answer." See, Brief of Appellant, pp. 1 & 5.

In view of this court's decision in Fibreboard Paper Products Corp. v. Dietrich, 25 Utah 2d 65, 475 P.2d 1005 (1970), appellants' contention that the letters Mr. Hirota sent

to Mansour's counsel constitute an answer to the third-party complaint is without merit. In the Fibreboard case, the plaintiff claimed that a letter the defendant wrote to the plaintiff's attorney, who then filed the letter with the clerk of the court, constituted an answer and a general appearance on behalf of the defendant. 475 P.2d at 1006. The letter reads as follows:

Dear Sirs:

This is in answer to complaint civil No. 184947.

First: You claim that we are residents of Salt Lake County or have property in Salt Lake County, State of Utah.

Answer: We moved to Pacifics, Calif. on March 8, 1965 and have been residents of Calif. since and we have never had property in Salt Lake County.

Second: Mr. Knowlton, I once told you that this bill was not mine. And that the person responsible has used or signed my name, 'whichever the case.'

Remarks: Last February, 1969, you had a wage attachment against me. I have suffered embrassment [sic], my job was jeopardized, and other personal effects.

Now: I had to hire an attorny [sic] to get my money that was held for this attachment. The same Civil No. 184947.

Please let me know if you are going to pursue this matter, 'if so,' I will let my attorny [sic] handle it. My compensation for this matter may be expensive.

Ronald W. Dietrich

Id. at 1007, nt. 1.

The court held that the letter did not constitute a general appearance, stating simply: "The claim of the plaintiff that the defendant Ronald W. Dietrich made a general appearance by the filing of his letter above referred to is without merit." Id. at 1006. An answer is always an appearance. Rio Del Mar Country Club v. Superior Court, 84 Cal. App. 2d 214, 190 P.2d 295, 300 (1948), 5 Am. Jur. 2d Appearance § 16 (1962). Hence, in Fibreboard, by finding that defendant Dietrich's letter was not a general appearance, this court necessarily determined that the letter was not an answer. Hirota Tekko's letter is not even styled as an answer, as was the Dietrich letter. Therefore, under the Fibreboard case, this court should find Hirota's letter neither to be an answer nor a general appearance.

It is significant that Mr. Hirota did not send his letter to the court, but merely sent it to Mansour's counsel. It would be patently unfair for this court to deem the filing of the letter by Mansour's counsel to be a general appearance and waiver of the defense of lack of personal jurisdiction by Hirota. Generally speaking, an appearance is an overt act by which a party comes into court and submits himself to its jurisdiction. 5 Am. Jur. 2d Appearance § 1 (1962); 6 C.J.S. Appearances § 2 (1975); see also Sharp v. Sharp, 196 Kan. 38, 409 P.2d 1019, 1021 (Kan. 1966). Hirota took no such action to put itself before the court. Mansour's counsel should not be

found to have acted vicariously on Hirota Tekko's behalf to bring Hirota Tekko before the court.

Additionally, the court below found that both Okada and Hirota were served between August 2 and August 10, 1985. R. 393. The court also found that counsel for each of the defendants requested and received an extension until January of 1986 in which to file pleadings, which they did. R. 393. Mansour cannot consistently, on one hand, grant Hirota an extension of time within which to file a responsive pleading, and then, on the other hand, assert that Mr. Hirota's letters constitute an answer to Mansour's third-party complaint.

Although Rule 12(h), Utah Rules of Civil Procedure, states that "a party waives all defenses and objections which he does not present either by motion . . . or, . . . in his answer or reply," it would be fundamentally unfair and denial of due process to apply that rule to the circumstances of this case and hold that Hirota has waived its right to contest personal jurisdiction. A waiver is the intentional relinquishment of a known right. To constitute a waiver, there must be an existing right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it. It must be distinctly made, although it may be express or implied. American Savings & Loan Ass'n v. Blomquist, 21 Utah 2d 289, 445 P.2d 1, 3 (1968). Here, Hirota's president, a Japanese citizen, who speaks English as a second language, and who likely has no

understanding of the American legal system, sent a one-sentence letter to Mansour's counsel denying all responsibility for the matter complained of. Certainly such action cannot be viewed as a knowing relinquishment of all possible defenses to the action against Hirota. The court should find, in accordance with the Fibreboard case, that the Hirota letter was neither an answer nor a waiver.

CONCLUSION

Because Hirota Tekko does not have sufficient minimum contacts with the State of Utah, it would be offensive to "traditional notions of fair play and substantial justice" to hale Hirota Tekko into Utah courts under the circumstances of this case. Also, Hirota Tekko did not waive the defense of lack of personal jurisdiction by sending letters to Mansour's counsel, which letters denied responsibility for the alleged injuries in the instant case. Therefore, respondent Hirota Tekko respectfully requests this court to affirm the district court's dismissal of the third-party complaint against Hirota Tekko.

DATED this 17th day of November, 1986.

SNOW, CHRISTENSEN & MARTINEAU

By Ryan E. Tibbitts
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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 1986, two true and correct copies of the foregoing Brief of Respondent Hirota Tekko, K.K. were served by first class mail upon each of the following counsel of record:

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